No 100.

Replied for the complainers; The rule of law is, that, where a new civil jurisdiction is created by statute, with a power to the new erected court to judge in special matters, its judgments are subject to the review of the Supreme civil Court, unless by the statute it is declared otherwise in express terms. Buchanan against Towart, No 81. p. 7347.; Ersk. B. 1. T. 2. § 7. A review of the proceedings in question cannot be denied without counteracting this important maxim of law; for this statute has nowhere said that the judgments of the Commisioners shall not be subject to the review of the Supreme Court.

It is not even to be implied or supposed from the passages founded on. The power of reviewing their own sentence, given by the statute to the Commissioners, affords no argument against the jurisdiction of the Court to review the sentences of both, or either of the meetings. In most cases, an appeal is admitted from the sentences of Justices of the Peace to the quarter-sessions. But the Supreme Court is entitled to rewiew the proceedings of all their meetings, unless excluded by statute.

THE COURT were of opinion, that, from the terms of the statute, it was the meaning of the legislature, that the sentence of the Commissioners should not be reviewable by any Court of law.

THE COURT refused the bill.

Fol. Dic. v. 3. *p.* 342. *Fac. Col. No* 44. *p.* 77.

1797. *June* 25.

DAVID PATILLO *against* SIR WILLIAM MAXWELL and Others.

No 101.
The Court was of opinion, that its inherent and constitutional power of review was not excluded by the comprehending act.

DAVID PATILLO, an inhabitant in the county of Dumfries, was (on the 13th May 1779) brought before a meeting of the Commissioners for executing the comprehending act, 19th George III. charged with being a disorderly person, following no employment, and, therefore, within the description of the act. This was denied by Patillo, who further *insisted*, that, at any rate, the act expressly prohibits enlisting any person in his circumstances, as he was above 50 years of age, and under the size required by the act.

The minutes of this meeting bear, that Patillo was examined by the Justices; 'and evidence with respect to his character being called, was found to be a 'person falling within the description of the act, and was therefore adjudged 'to serve his Majesty in terms thereof; being aged, as he says, but without 'producing any pooof thereof, fifty or thereby. And he was accordingly deli-'vered over to the officer appointed to receive him, according to the act of Par-'liament; the said Patillo is four feet five inches high.' Patillo was forthwith sent to jail by the recruiting-officer; and he afterwards presented a bill of suspension and liberation from prison, on finding sufficient caution that he should again make his appearance, when the question as to the legality of these proceedings should receive the judgement of the Court. In evidence of the fact

that he was upwards of fifty, a certificate was produced of the date of his baptism from the kirk-session record. No 101.

The Commissioners, in their answers to this bill, *objected*; That the Court of Session had no power to review their proceedings, and founded on two decisiont as directly in point for their plea; Robertson against the Justices of Stirlingshire, No 73. p. 7340.; Foote and Marshall against Stewart, No 100. p. 7385. On the question which ensued with regard to the Court's jurisdiction, the same arguments were used by the parties as are stated in these decisions. But the complainer further

Pleaded; That the decisions were not directly in point; and there were other grounds for having the proceedings under challenge reviewed by the Court than occurred on the former occasions. The only objection made in these cases to the proceedings of the Commissioners was, that iniquity had been committed by their judgment, finding the complainer a disorderly person, coming under the description of the act. But, in this case, the objection reaches to the jurisdiction of the commissioners, and does not rest merely on the sentence being iniquitous. The statute sets out with describing those who may be lawfully comprehended, such as disorderly persons, smugglers, &c. But all of these descriptions are qualified, with the following provision: 'Provided always, that no man be enlisted 'for his Majesty's service, by virtue of this act, who shall appear, in the opi-'nion of the Commissioners, or officers appointed to receive such men, to be 'under the age of 16 years, or above the age of 50, or who, being under the 'age of 18 years, shall be under the size of five feet three inches without shoes. 'or, being above the age of 18, shall be under the size of five feet four inches 'without shoes.

The act, therefore, excludes commissioners from exercising any jurisdiction over persons in the situation of the complainer, though the evidence were ever so clear that they came within the description of the act as disorderly persons. It does not merely give an exemption to men above fifty, or under size, from being made soldiers. The act prohibits enlisting them, even if they should be inclined to enlist; and the Commissioners are debared from sending persons of that description into his Majesty's service.

Answered for the Commissioners; That the powers conferred by the statute on them are to take cognisance of, and to determine finally in every case where a man is brought before them, whether he ought to be adjudged as a soldier. Consequently they must have the same power of determining finally, whether he is of the age and size required by the statute, as of any of the other requisites necessary to bring him under the statute. There is, therefore, no solid distinction betwixt the present case and those formerly decided. But, further, the words of the act necessarily imply, that the Commissioners had a jurisdiction in the present case; for the persons that are not to be enlisted, are declared in the act to be such as, 'in the opinion of the Commissioners,' are above 50, or under the size mentioned in the statute.

No 101. The Court, in general, were of opinion, that, although bills of this kind ought not to be passed, except where very good and sufficient reasons are shown; yet, their powers of reviewing the sentences of the Commissioners, arising from their inherent and constitutional jurisdiction, were not excluded by this statute.

The Court 'passed the bill.'

Lord Ordinary, *Ankerville.* Act. *Crosbie.* Alt. *M'Laurin.* Clerk, ——

Fol. Dic. v. 3. *p.* 342. *Fac. Col. No* 81. *p.* 156.

1780. *August* 10. *and* 1781. *June* 22.

Couper, &c. *against* Sir John Ogilvy.

No 102. In a case where certain tradesmen in Montrose had been adjudged under the comprehending act, on account of their having been concerned in a mob; although the bill of suspension was at first refused, the Court afterwards, upon due consideration, passed it, and ordered the complainers to be liberated, as having been unduly adjudged. *See* Appendix.

Fol. Dic. v. 3. *p.* 342.

1781. *July* 3. Patrick Home *against* Elizabeth and Jean Wood.

No 103.
The Court found that they could not review a decree of exception, pronounced under authority of the act 5th Geo. I. chap. 22, relative to forfeitures.

Upon the attainder of George Home of Wedderburn for his accession to the rebellion 1715, Robert Wood, portioner of Whitsome, one of his vassals, applied to Exchequer, in terms of the 1st Geo. I. chap. 50, commonly called the Clan-act, and obtained a charter from the crown; which right was afterwards, 10th September 1719, confirmed by a decree of exception, in terms of the act 5th Geo. I. chap. 22.

Under this last statute, a claim to the whole estate of Wedderburn was likewise entered by Ninian Home, who, in virtue of certain adjudications, &c. subsisting in his person, previously to the forfeiture, was found, 16th September 1719, to have right to the property of the said lands and others mentioned in the exceptions. And it was also found, 'that the said George Home had no right or title to the said lands and others aforesaid, upon the 24th day of June 1715 years, (the retrospective date of the statute) nor at any time since; and that the public has no right nor title to the said lands and others, by the attainder of the said George Home.'

In the 1729, Ninian Home expede a charter of the estate; and, a few years afterwards, disponed it to the heir of the family, who, in the 1746, called Wood and some others of the vassals in a process of reduction, declarator, and non-entry. This process, however, was never brought to a conclusion, till Mr